



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

September 22, 1994

Ms. Myra C. Schexnayder  
Assistant School Attorney  
Houston Independent School District  
Hattie Mae White Administration Building  
3830 Richmond Avenue  
Houston, Texas 77027-5838

OR94-582

Dear Ms. Schexnayder:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act (the "act"), chapter 552 of the Government Code. Your request was assigned ID# 27524.

The Houston Independent School District ("HISD") has received a request for the following information:

1. All records detailing scores on all oral or written language assessment skills tests taken by any [alternative certification program] intern or HISD teacher since May 15, 1994.
2. All internal memorandum relating to HISD alternative certification program written by any HISD employee since May 15, 1994.
3. Documents detailing outside legal firms employed by HISD legal department since January 1, 1993. Documents should include board agenda items, internal memorandums stating reasons for securing firms, contracts and payments to said firms.

We understand that HISD does not seek a ruling with respect to the first and third categories. HISD asserts that some of the information requested in the second category is protected from public disclosure under sections 552.101, 552.103, and 552.111. You have submitted this information to our office for our review.

First, we address your assertion that all of the submitted information is excepted from required public disclosure under section 552.103. That provision excepts from required public disclosure information relating to litigation "to which the state or political subdivision . . . is or may be a party." Gov't Code § 552.103(a). For section 552.103 to apply, the information must relate to litigation to which HISD is or may be a party. Section 552.103 requires concrete evidence that litigation is realistically contemplated; it must be more than mere conjecture. Open Records Decision Nos. 518 (1989) at 5; 328 (1982). Thus, to secure the protection of this exception, a governmental body must demonstrate that requested information "relates" to a pending or reasonably anticipated judicial or quasi-judicial proceeding. Open Records Decision No. 551 (1990); *see also* Open Records Decision No. 588 (1991) (contested case under statutory predecessor to Administrative Procedure Act is litigation for purposes of former V.T.C.S. article 6252-17a, section 3(a)(3) exception).

You have informed us that HISD's alternative certification program ("ACP") is currently being investigated by several outside law firms on HISD's behalf and by the Harris County District Attorney's Office and the United States Immigration and Naturalization Service. With respect to section 552.103, you state that "[g]iven the nature of the pending investigation described above, it is conceivable that HISD employees may ultimately be named as parties to litigation of a criminal or civil nature." This conjecture is not concrete enough to demonstrate that litigation to which HISD will be a party may be reasonably anticipated. Accordingly, we conclude that the submitted documents may not be withheld under section 552.103.

You also assert that memorandums responsive to the second category are protected from required public disclosure under section 552.111. Section 552.111 excepts "[a]n interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." In a recent opinion that reexamined the section 552.111 exception, this office concluded that section 552.111 excepts from public disclosure only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body at issue. Open Records Decision No. 615 (1993) at 5. The policymaking functions of an agency, however, do not encompass routine internal administrative and personnel matters. *Id.* Furthermore, section 552.111 does not except purely factual information from disclosure. *Id.*

We have reviewed the information submitted by HISD. The information you have marked as protected by section 552.111 is generally factual. Moreover, it deals with routine administrative and personnel matters, and does not reflect the policymaking processes of HISD. The one document that arguably touches on HISD policy, a June 20, 1994 memorandum to the HISD trustees from a representative of the Houston Federation of Teachers, was not generated internally. Therefore, we conclude that none of this information may be excepted from required public disclosure under section 552.111.


You assert that attachment B is protected by the attorney-client privilege. We assume you intended to invoke section 552.107(1). Section 552.107(1) excepts from required public disclosure "information that the attorney general or an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Rules of the State Bar of Texas." In Open Records Decision No. 574 (1990), this office held that this exception protects information that reveals client confidences to an attorney or that reveals the attorney's legal advice to a client. You assert that the documents in attachment B reflect legal advice or confidential client communications. We agree that the memorandum from the school attorney to the superintendent of schools constitutes attorney legal advice to a client. This document may be withheld from disclosure under section 552.107(1) in its entirety. On the other hand, it is not apparent from the face of the other two documents, which list the hourly rates of outside attorneys, that they reflect an attorney's legal advice to a client or a confidential client communication, nor have you demonstrated that this is the case. Therefore, we conclude that you may not withhold these documents under section 552.107(1).

In addition, in a letter dated July 28, 1994, you stated that HISD had just discovered that the school attorney had "generated a number of personal, handwritten notes." You recently submitted these documents to this office for our review. In your July 28, 1994 letter, you contended that these notes constitute attorney work product. The attorney work product discovery privilege is subsumed within section 552.103(a). Open Records Decision Nos. 575 at 2, 574 at 6 (1990). As noted above, HISD has not demonstrated that litigation is pending or reasonably anticipated. Therefore, the notes may not be withheld under section 552.103(a).

In your September 2, 1994 letter to this office forwarding the notes to this office, you asserted for the first time that these documents are excepted from required public disclosure under sections 552.107 and 552.111. Section 552.301(a) of the Government Code requires a governmental body that receives a request for information to request an open records ruling from this office within ten calendar days. If the governmental body does not request a ruling within that time, the information is presumed to be open to the public. *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379 (Tex. App.--Austin 1990, no writ). This presumption can be overcome only by a showing that the information is confidential under some other source of law or that third-party interests are at stake. See Open Records Decision Nos. 586 (1991); 150 (1977). Even assuming that the ten-day period for requesting an opinion regarding the notes began to run from July 28, 1994, as you suggest, HISD did not assert sections 552.107 and 552.111 with respect to the notes until September 2, 1994, several weeks after the expiration of the statutory ten-day period. Both section 552.107 and section 552.111 are discretionary exceptions which are waived if the governmental body fails to adhere to the ten-day deadline. See Open Records Decision No. 630 (1994) (attorney-client privilege waived by governmental body's failure to raise it within ten-day deadline). You have failed to show that the notes are confidential under some other source of law or that third-party interests are at stake. Therefore, the notes must be released.

If you have questions about this ruling, please contact our office.

Yours very truly,

A handwritten signature in black ink, appearing to read "Mary R. Crouter". The signature is fluid and cursive, with a long horizontal stroke at the end.

Mary R. Crouter  
Assistant Attorney General  
Open Government Section

MRC/LRD/rho

Ref.: ID# 27524

Enclosures: Submitted documents

cc: Mr. Wayne Dolcefino  
KTRK-TV/ABC  
P.O. Box 13  
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(w/o enclosures)